In the
Virginia Court of Appeals

Record No. 0116-13-4

HADEED CARPET CLEANING, INC.,

Plaintiff-Appellee,

v.

JOHN DOE # 1, *et al.*,

Def endants.

YELP, INC.,

Non-party respondent-Appellant.

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTION AND STATUTES

MISCELLANEOUS

When pervasive advertisements from a local merchant feature prices that seem to be just too good to be true, they may, in fact, not be the price that the average consumer will pay. Dozens of consumers who have used pseudonyms to post about their experiences with appellee Hadeed Carpet Cleaning, Inc. ("Hadeed") on the popular website www.yelp.com, maintained by appellant Yelp Inc. ("Yelp"), report that Hadeed routinely fails to honor the advertised discount prices. Hadeed's responses to several consumers on Yelp suggest that it recognizes the problem; yet its complaint for defamation singles out the authors of seven reviews posted on Yelp that say the same thing as the other online detractors of Hadeed and its sister business, Hadeed Oriental Rug Cleaning. Based on that allegation, Hadeed invoked the court's subpoena power to strip its pseudonymous critics of their First Amendment right to speak anonymously.

The main question on this appeal—an issue of first impression at the appellate level in Virginia—is whether the trial court applied the proper legal standard in overriding the anonymous speakers' First Amendment rights. Courts elsewhere have recognized that, given the valuable role played by the First Amendment right to speak anonymously in encouraging ordinary people to express themselves fully, it is necessary to balance that right against a plaintiff's right to seek redress for wrongful speech by adopting a standard requiring a plaintiff to do more than articulate a good faith belief that the speech "may be tortious." Before stripping the defendant of a First Amendment right, these courts take an early look at the merits of the plaintiff's claim to determine whether a valid claim has been alleged and whether there is a prima facie evidentiary basis for that claim. In this appeal, Yelp urges Virginia to adopt the same approach, and to remand this case to give Hadeed an opportunity to pursue its subpoena by meeting the proper standard.

ASSIGNMENTS OF ERROR

1. The trial court violated the First Amendment by ordering Yelp to identify the seven

anonymous Doe defendants, and then by holding Yelp in contempt for its failure to comply with this order, thus stripping the Doe defendants of their First Amendment right to speak anonymously, all without requiring Hadeed to show that it had legally and factually sufficient claims against each defendant. App. 8, 152-158, 184, 190-191.

2. The trial court erred by asserting subpoena jurisdiction over Yelp, a non-party corporation. App. 7-8, 148-152.

FACTS AND PROCEEDINGS BELOW

A. Background

Protection for the right to engage in anonymous communication is fundamental to a free society. Indeed, as electronic communications have become essential tools for speech, the Internet in all its forms—web pages, email, chat rooms, and the like—has become a democratic institution in the fullest sense. It is the modern equivalent of Speakers' Corner in England's Hyde Park, where ordinary people may voice their opinions, however silly, profane, or brilliant, to all who choose to listen. As the Supreme Court explained in *Reno v. American Civil Liberties Union*, 521 U.S. 844, 853, 870 (1997),

> From a publisher's standpoint, [the Internet] constitutes a vast platform from which to address and hear from a world-wide audience of millions of readers, viewers, researchers and buyers. . . . Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of web pages, . . . the same individual can become a pamphleteer.

Full First Amendment protection applies to speech on the Internet.

Knowing that people have personal interests in news developments, and that people love to share their views with anyone who will listen, many companies have organized outlets for the

expression of opinions. For example, Yahoo! and Raging Bull host message boards for every publicly traded company where investors, and other members of the public, can post discussions about the company. Blogspot, WordPress and TypePad give individuals the opportunity to create blogs of their own, on which bloggers can at no cost post discussions of current events, public figures, companies, or other topics while leaving it open for visitors to post their own comments. Other web sites, of which Yelp is a leading example, have organized forums for consumers to share their experiences with local merchants.

The individuals who post messages often do so under pseudonyms—similar to the old system of truck drivers using "handles" when they speak on their CB's. Nothing prevents an individual from using his real name, but, as inspection of the forum at issue here will reveal, many people choose nicknames that protect the writer's identity from those who disagree with him or her, and hence encourage the uninhibited exchange of ideas and opinions.

Many Internet forums have a significant feature—and Yelp is typical in that respect—that makes them very different from almost any other form of published expression. Subject to requirements of registration and moderation, any member of the public can use the forum to express his point of view; a person who disagrees with something that is said on a message board for any reason—including the belief that a statement contains false or misleading information—can respond to that statement immediately at no cost, and that response can have the same prominence as the offending message. Most online forums are thus unlike a newspaper, which cannot be required to print responses to its criticisms. *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974). By contrast, on most Internet forums, companies and individuals can reply immediately to criticisms, giving facts or opinions to vindicate their positions, and thus, possibly, persuading the audience that

they are right and their critics are wrong. Appellant Yelp, indeed, enables any merchant whose goods and services are subject to consumer reviews to place its reply directly under the review to which it is replying; Hadeed, the appellee in this case, has repeatedly taken advantage of this privilege. And, because many people regularly revisit message boards, a response is likely to be seen by much the same audience as those who saw the original criticism; hence the response reaches many, if not all, of the original readers. In this way, the Internet provides the ideal proving ground for the proposition that the marketplace of ideas, rather than the courtroom, provides the best forum for the resolution of disagreements about the truth of disputed propositions of fact and opinion.

B. Facts of This Case

Hadeed is a Virginia company that takes consumers' carpets to its premises for cleaning. As of October 19, 2012, Yelp's public web site displayed seventy-five reviews about Hadeed and eight more reviews about a related company, Hadeed Oriental Rug Cleaning, that had been posted by various users on the Internet platform that Yelp provides to enable consumers to describe their experiences with local businesses. Yelp's Terms of Service and Content Guidelines require reviewers to have actually been customers of the business in question, and to base their posts on their own personal experiences. App. 79a ¶ 9. 82-118. Posts that Yelp deems in violation of these requirements are subject to removal. In addition, Yelp uses a proprietary algorithm to "filter" potentially less reliable reviews; such reviews are moved to a separate page, which a visitor to Yelp's site can view by clicking on a link at the bottom of a business listing with "filtered" reviews; ratings associated with those reviews are not factored into the business's overall rating on Yelp. App. 79b ¶ 12. Taking the filtered and unfiltered reviews together, forty-eight reviews gave Hadeed the lowest possible rating, one star, but twenty-eight others gave it the highest possible rating of five stars.

Two, three and two posters gave ratings of two, three and four stars, respectively. App. 82-118.[1]

Yelp users must register to be able to post reviews; in the registration process, users must provide a valid email address. App. 78-79 ¶ 3 . However, users are free to choose a screen name of their own choosing, and may also designate a particular zip code of their choosing as their "location." There is no requirement that the user's actual name or actual place of residence be identified (although Yelp encourages users to provide real names, and requires real names for members of its Elite user program). *Id.* Moreover, users who change locations are not required to change their location description when they move. *Id.* Yelp also typically records the Internet Protocol ("IP") address from which each posting is made. App. 79 ¶ 4. This information is typically stored in Yelp's administrative database, and is accessible to Yelp's custodian of records in San Francisco. *Id.*

Hadeed filed suit against the authors of seven specific reviews. It alleges that it had tried to match the reviews with its customer database but "had no record that [these] negative reviewers were ever actually Hadeed Carpet customers." App. 3 ¶ 13. It notes that Yelp refused to identify the posters to assist its investigation. *Id.* ¶ 14. Hadeed alleges that the posts were false and defamatory, *id.* ¶ 15, but notably does not allege that the substance of the accusations in the postings were false. For example, Hadeed does not deny that it sometimes charges twice the advertised price, that it sometimes charges for work that was never performed, that unauthorized work is ever performed, or that rugs are sometimes returned to the customer containing stains that were not successfully

[1] This data is based on the reviews shown on the web site as of October 19, 2012, and posted between May 2008 and September 2012. The numbers do not include six separate reviews, each giving Hadeed the lowest rating, that were removed entirely for violating Yelp's Content Guidelines or Terms of Service.

removed. Rather, the **only** falsity alleged in the complaint is the assertion that, contrary to the assertions in each of the contested reviews, in fact the posters were not actual customers of Hadeed. App. 4 ¶ 20, 5 ¶ 22.

Although there are common threads among the substantive complaints in the challenged posts, such as customers being charged twice the advertised price, many other Yelp reviews share the same themes. *E.g.*, App. 84, 85, 87, 88, 89, 90, 92. The fact that Hadeed has **not** sued the authors of those comments implies that Hadeed recognizes that its actual customers have such problems. Indeed, taking advantage of the fact that merchants who create Yelp accounts can place a reply to each review directly under the review itself, Hadeed responded to several customer reviews that raise such issues by promising that the feedback would help the company to improve. *E.g.*, App. 84, 85. *See also* App. 101 (Hadeed apologized to MP, one of the reviewers it is now suing.).[2] Review of the IP addresses for the challenged posts reveals that each came from a different computer, implying that each was posted by a different individual. App. 185 ¶ 5.

C. Proceedings Below.

On July 2, 2012, Hadeed filed a complaint in the Circuit Court for the City of Alexandria, alleging defamation and conspiracy to defame against two John Does and a Doe corporation. On July 3, 2012, Hadeed issued a subpoena duces tecum to Yelp, seeking documents revealing identifying information about the authors of each of the challenged comments, as well as other information about those authors' use of the Yelp web site. On July 19, 2012, Yelp served written objections to the subpoena, contending that Hadeed had not complied with Virginia's statutory

[2] A similar acknowledgment to "Asad," posted after the comments at issue in this case, can be seen at http://www.yelp.com/biz/hadeed-carpet-alexandria#hrid:eEU7CqR8Wlv3z4wO4jieWA; several more can be seen by looking at the filtered reviews posted even later.

procedure for subpoenas to identify anonymous Internet users, Code of Virginia § 8.01-407.1, that the First Amendment protects its users from being identified unless the plaintiff can present a prima facie case that their speech is tortious, that the subpoena violated the federal Stored Communications Act, and that, because Yelp does not keep the relevant documents in Virginia, the subpoena had to be domesticated in California to be enforceable.

On July 27, 2012 Hadeed served a renewed subpoena on Yelp's registered agent, attaching documents to establish the basis for its belief that the challenged posts were actionable, so that Yelp could provide those documents to its users pursuant to § 8.01-407.1(A)(3) of the Virginia Code. Pursuant to § 8.01-407.1(A)(4), Yelp filed detailed written objections to the subpoena in the Circuit Court, renewing its contentions that the subpoena contravened both Virginia law and the First Amendment rights of Yelp's users, contending as well that a Virginia court lacked jurisdiction to subpoena documents from a California company just because that company had a registered agent in Virginia.[3] Yelp contended that the Virginia courts should adopt the analysis of the First Amendment adopted by state appellate courts throughout the country, following the lead of *Dendrite v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001), and *Doe v. Cahill*, 884 A.2d 451 (Del. 2005), that requires a plaintiff seeking to identify anonymous Internet speakers to make both a legal and an evidentiary showing that the suit has merit before a court may deny users the First Amendment right to speak anonymously.

Hadeed moved to overrule the objections and cross-moved to enforce the subpoena. It argued

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[3] The objections included the contention that, by seeking otherwise confidential details about Yelp users' use of the Yelp web site, the subpoena violated the Stored Communications Act. Because Hadeed agreed to confine its subpoena to identifying information, App. 176, that issue is not discussed any further in this brief.

that Virginia law authorized the service of subpoenas for the production of documents on any out-of-state corporation that maintains a registered agent, and that Hadeed's genuine belief that the people criticizing it were not actually Hadeed customers, but an unnamed competitor, was sufficient to overcome the First Amendment right to speak anonymously. The trial court heard oral argument on November 14, 2012, App. 143-180, and enforced the subpoena several days later. App. 181-183. The court decided first that service of a subpoena duces tecum on Yelp's Virginia registered agent was sufficient to empower the Virginia courts to compel production of documents located outside the state. App. 181-182. The court then held that defamatory speech enjoys diminished protection under the First Amendment, *id.* 182, and that Virginia Code section 8.01-407.1 sets forth a standard whereby it is sufficient for a would-be plaintiff against Doe defendants to show that statements "may be tortious." *Id.* The court concluded that, if the posters of the seven challenged Yelp reviews were not customers, the statements would be tortious, and consequently Hadeed had met the constitutional and statutory standards sufficient to require Yelp to reveal the identities of the Does. *Id.*

Recognizing that it could not appeal this ruling without putting itself in contempt of the disclosure order, Yelp told Hadeed that it would not comply. App. 184 ¶¶ 2-3. However, in an effort to avoid this appeal, and consistent with Yelp's Terms of Service and Content Guidelines, which require that reviews be based on first-hand consumer experiences, Yelp invited Hadeed to identify any competitor whom Hadeed thought might be posting fake consumer reviews. App. 185. ¶ 6 Yelp indicated, with such information, that it would conduct its own investigation and take further action if Yelp could determine that Hadeed's supposed suspicions were plausible. *Id.* However, Hadeed was not willing to provide any information that would enable such an investigation. *Id.*

Accordingly, Yelp confirmed that it would not comply with the order, and Hadeed moved to have Yelp held in contempt. At the January 9, 2013, hearing, the court below recognized that Yelp's only reason for not complying was to protect its right to appeal to protect its users' rights, App. 190, but indicated that its sanction would be the minimum needed to make the order appealable. App. 194-195. The court thus held Yelp in contempt, imposing a monetary sanction of $500 and awarding Hadeed an additional $1000 in attorney fees. App. 199. The sanctions were stayed pending appeal, App. 199-200; Yelp noticed its appeal on January 15, 2013. App. 201.

SUMMARY OF ARGUMENT AND STANDARD OF REVIEW

The Internet has the potential to be an equalizing force within our democracy, giving ordinary citizens the opportunity to communicate, at minimal cost, their views on issues of public concern to all who will listen. Full First Amendment protection applies to communications on the Internet, and longstanding precedent recognizes that speakers have a First Amendment right to communicate anonymously, so long as they do not violate the law in doing so. Thus, when a complaint is brought against an anonymous speaker, the courts must balance the right to obtain redress from the perpetrators of civil wrongs against the right of those who have done no wrong to remain anonymous. In cases such as this one, these rights come into conflict when a plaintiff complains about the content of material posted online and seeks relief against its author, including an order compelling disclosure of a speaker's identity, which, if successful, would irreparably destroy the defendant's First Amendment right to remain anonymous.

Moreover, suits against anonymous speakers are unlike most tort cases, where identifying an unknown defendant at the outset of the case is merely the first step toward establishing liability for damages. In a suit against an anonymous speaker, identifying the speaker gives an important

measure of relief to the plaintiff because it enables it to employ extra-judicial self-help measures to counteract both the speech and the speaker; identification creates a substantial risk of harm to the speaker, who not only loses the right to speak anonymously, but may be exposed to efforts to restrain or punish his speech. For example, an employer might discharge a whistleblower, and a public official might use his powers to retaliate against the speaker, or might use knowledge of the critic's identity in the political arena. There is evidence that access to identifying information to enable extra-judicial action may be the only reason some plaintiffs bring such suits (infra 15-16).

Whatever the reason for speaking anonymously, a rule that makes it too easy to remove the cloak of anonymity will deprive the marketplace of ideas of valuable contributions. Moreover, our legal system ordinarily does not give substantial relief of this sort, even on a preliminary basis, absent proof that the relief is justified because success is likely and the balance of hardships favors granting the relief. The challenge for the courts is to develop a test for the identification of anonymous speakers that makes it neither too easy for deliberate defamers to hide behind pseudonyms, nor too easy for a company or a public figure to unmask critics simply by filing a complaint that purports to state an untested claim for relief under some tort or contract theory.

Although the standard for resolving such disputes is an issue of first impression in this Court, the Court will not be writing on an entirely clean slate because many appellate courts in other jurisdictions have considered this question in light of the principle that only a compelling interest is sufficient to warrant infringement of the free speech right to remain anonymous. Consequently, those courts have ruled that a trial judge faced with a demand for discovery to identify an anonymous Internet speaker so that he may be served with process should: (1) provide notice to the potential defendant and an opportunity to defend his anonymity; (2) require the plaintiff to specify the

statements that allegedly violate his rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of his claims; and, in many jurisdictions (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing his right to remain anonymous, in light of the strength of the plaintiff's evidence of wrongdoing. Applying these requirements, a court can ensure that a plaintiff does not obtain an important form of relief—identifying its anonymous critics—and that the defendant is not denied important First Amendment rights unless the plaintiff has a realistic chance of success on the merits.

Meeting these criteria can require time and effort on a plaintiff's part. However, everything that the plaintiff must do to meet this test, it must also do to prevail on the merits of her case. So long as the test does not demand more information than a plaintiff would reasonably be able to provide shortly after filing the complaint, without taking any discovery—and other cases show that plaintiffs with valid claims are easily able to meet such a test—the standard does not unfairly prevent the plaintiff with a legitimate grievance from securing redress against an anonymous speaker.

The order below should also be reversed because the Virginia legislature has never given the courts of the state jurisdiction to compel out-of-state nonparty corporations to produce documents without resort to the interstate discovery procedures that all other states use to enable their own litigants to obtain documents from Virginia corporations.

Rulings on discovery motions are normally reviewed for abuse of discretion. However, because the ruling rests on errors of law, review is undertaken de novo. *Glazebrook v. Board of Supervisors of Spotsylvania Cy.*, 266 Va. 550 (2003). Moreover, on the issues involving the First

Amendment, the Court conducts an independent review on the entire record under *Bose Corp. v. Consumers Union*, 466 U.S. 485, 508-511 (1984).

ARGUMENT

I. THE FIRST AMENDMENT REQUIRES A SHOWING OF MERIT ON BOTH THE LAW AND THE FACTS BEFORE A SUBPOENA TO IDENTIFY AN ANONYMOUS SPEAKER IS ENFORCED.

Appellate courts in many other states have addressed the same question on which the decision in this case turns—what showing should a plaintiff have to make before it may be granted access to the subpoena power to identify an anonymous Internet user who has criticized the plaintiff? As shown below at pages 17 to 21, those courts have decided that it is not enough for the plaintiff to show that it is only **possible** that the plaintiff has a valid claim, or to put forward a good faith belief in the rightness of its cause. Every other appellate court has held, whether under the First Amendment or under state procedures, that anonymous defendants are entitled to demand that the plaintiff make a factual showing, not just that the anonymous defendant has made critical statements, but also that the statements are actionable and that there is an evidentiary basis for the prima facie elements of the claim. Some appellate courts have required, as well, an express balancing of the plaintiff's interest in prosecuting its lawsuit against the anonymous defendant's reasons for needing to stay anonymous.

A defamation plaintiff is uniquely in a position to know why the statement that it alleges to be false is, in fact, false and defamatory. Unlike, for example, a personal injury plaintiff, who may know only that she or he is suffering in some way, without knowing why, the defamation plaintiff typically knows, before it decides to file suit, the evidence that would show the defendant's accusation to be false and defamatory. There is typically no reason why, at the outset of a case, a

merchant about which false statements have been made cannot present evidence of falsity. In light of the constitutional protection for anonymous speech, and the value that society places on that right, this Court should join the broad judicial consensus in requiring such a showing.

A. The Constitution Limits Compelled Identification of Anonymous Internet Speakers.

The First Amendment protects the right to speak anonymously. *Watchtower Bible & Tract Soc'y v. Village of Stratton*, 536 U.S. 150, 166-167 (2002); *McIntyre v. Ohio Elections Comm.*, 514 U.S. 334 (1995); *Talley v. California*, 362 U.S. 60 (1960). These cases have celebrated the important role played by anonymous or pseudonymous writings over the course of history, from Shakespeare and Mark Twain to the authors of the Federalist Papers:

> [A]n author is generally free to decide whether or not to disclose his or her true identity. The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible. Whatever the motivation may be, . . . the interest in having anonymous works enter the marketplace of ideas unquestionably outweighs any public interest in requiring disclosure as a condition of entry. Accordingly, an author's decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication, is an aspect of the freedom of speech protected by the First Amendment.
> * * *
> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent.

McIntyre, 514 US at 341-342, 356 (emphasis added).

The right to speak anonymously is fully applicable online. The Supreme Court has treated the Internet as a public forum of preeminent importance because it places in the hands of any individual who wants to express his views the opportunity to reach other members of the public who are hundreds or even thousands of miles away, at virtually no cost. *Reno v. ACLU*, 521 U.S. 844, 853, 870 (1997). Several courts have specifically upheld the right to communicate anonymously

over the Internet. *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009); *In re Does 1-10*, 242 SW3d 805 (Tex. App. 2007); *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007); *Doe v. Cahill*, 884 A.2d 451 (Del. 2005); *Dendrite v. Doe*, 775 A.2d 756 (N.J. App. 2001).

Internet speakers may choose to speak anonymously for a variety of reasons. They may wish to avoid having their views stereotyped according to their racial, ethnic or class characteristics, or their gender. They may be associated with an organization but want to express an opinion of their own, without running the risk that, despite the standard disclaimer against attribution of opinions to the group, readers will assume that the group feels the same way. They may want to say or imply things about themselves that they are unwilling to disclose otherwise. And they may wish to say things that might make other people angry and stir a desire for retaliation.

Although the Internet allows individuals to speak anonymously, it creates an unparalleled capacity to monitor every speaker and to discover his or her identity. Because of the Internet's technology, any speaker who sends an e-mail or visits a website leaves an electronic footprint that, if saved by the recipient, starts a path that can be traced back to the original sender. *See* Lessig, *The Law of the Horse: What Cyber Law Might Teach*, 113 Harv. L. Rev. 501, 504-505 (1999). Thus, anybody with enough time, resources and interest, if coupled with the power to compel disclosure of the information, can learn who is saying what to whom. Consequently, to avoid the Big Brother consequences of a rule that enables any company or political figure to identify its critics, the law provides special protections for anonymity on the Internet. *E.g.*, Lidsky & Cotter, *Authorship, Audiences and Anonymous Speech*, 82 Notre Dame L. Rev. 1537 (2007).

Experience has taught that, when courts do not create sufficient barriers to subpoenas to identify anonymous Internet speakers named as defendants, the subpoena can be the main point of

the litigation, in that plaintiffs may identify their critics and then seek no further relief from the court. Thompson, *On the Net, in the Dark*, California Law Week, Volume 1, No. 9, at 16, 18 (1999). Some lawyers admit that the mere identification of their clients' anonymous critics may be all that they desire to achieve through the lawsuit. *E.g.*, Werthammer, *RNN Sues Yahoo Over Negative Web Site*, Daily Freeman, Nov. 21, 2000, www.zwire.com/site/news.cfm?newsid=1098427&BRD=1769&PAG=461&dept_id=4969&rfi=8. An early advocate of using discovery procedures to identify anonymous critics has urged corporate executives to use discovery first, and to decide whether to sue for libel only after the critics have been identified and contacted privately. Fischman, *Your Corporate Reputation Online*, www.fhdlaw.com/html/corporate_reputation. htm; Fischman, *Protecting the Value of Your Goodwill from Online Assault*, www.fhdlaw.com/html/bruce_article.htm. Lawyers who represent plaintiffs in these cases have also urged companies to bring suit, even if they do not intend to pursue the action to a conclusion, because "[t]he mere filing of the John Doe action will probably slow the postings." Eisenhofer & Liebesman, *Caught by the Net*, 10 Business Law Today No. 1 (Sept.-Oct. 2000), at 40. These lawyers have similarly suggested that clients decide whether it is worth pursuing a lawsuit only after finding out who the defendant is. *Id.* Indeed, in *Swiger v. Allegheny Energy*, 2006 WL 1409622 (E.D. Pa. May 19, 2006), a company represented by the largest and most respected law firm in Philadelphia filed a Doe lawsuit, obtained the identity of an employee who criticized it online, fired the employee, and then dismissed the lawsuit without obtaining any judicial remedy other than the removal of anonymity.

Indeed, companies that make pornographic movies have recently been brought mass copyright infringement lawsuits against hundreds of anonymous Internet users at a time, without any intention of going to trial, but hoping that embarrassment at being subpoenaed and then publicly

identified as defendants in such cases will be enough to induce them to pay thousands of dollars in settlements. *Mick Haig Productions v. Doe*, 687 F.3d 649, 652 & n.2 (5th Cir. 2012); *Patrick Collins v. Doe 1*, 288 F.R.D. 233 (E.D.N.Y. 2012). Indeed, some pornographic films are now being made not to be sold, but to be used as the basis for subpoenas to identify alleged downloaders who can then be pressured to "settle" to avoid the embarrassment of being named publicly as defendants in such litigation. *On The Cheap, LLC v. Does 1–5011*, 280 F.R.D. 500, 504 n.6 (N.D. Cal. 2011). These abuses provide yet another reason why strict standards should be applied to such subpoenas.

Although Hadeed is a private entity, its subpoena invoked judicial authority to compel a third party to provide information. A court order, even when issued at the behest of a private party, is state action and hence is subject to constitutional limitations. That is why, for example, an action for damages for defamation, even when brought by an individual, must satisfy First Amendment scrutiny, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), and why a request for injunctive relief, even at the behest of a private party, is similarly subject to constitutional scrutiny. *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Shelley v. Kraemer*, 334 U.S. 1 (1948). Because compelled identification trenches on the First Amendment right of anonymous speakers to remain anonymous, justification for infringing that right requires proof of a compelling interest, and beyond that, the restriction must be narrowly tailored to serve that interest. *McIntyre*, 514 U.S. at 347.

As one court said in refusing to order identification of anonymous Internet speakers whose identities were allegedly relevant to the defense against a shareholder derivative suit, "If Internet users could be stripped of . . . anonymity by a civil subpoena enforced under the liberal rules of civil discovery, this would have a significant chilling effect on Internet communications and thus on basic

First Amendment rights." *Doe v 2theMart.com*, 140 F. Supp.2d 1088, 1093 (W.D. Wash. 2001).

See also Columbia Insurance Co. v. Seescandy.com, 185 F.R.D. 573, 578 (N.D .Cal. 1999):

> People are permitted to interact pseudonymously and anonymously with each other so long as those acts are not in violation of the law. This ability to speak one's mind without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate .... People who have committed no wrong should be able to participate online without fear that someone who wishes to harass or embarrass them can file a frivolous lawsuit and thereby gain the power of the court's order to discover their identities.
>
> (emphasis added).

B. Many Courts Now Require a Detailed Legal and Evidentiary Showing for the Identification of John Doe Defendants Sued for Criticizing the Plaintiff.

The fact that a plaintiff has sued over certain speech does not create a compelling government interest in taking away defendant's anonymity. The challenge for courts is to find a standard that makes it neither too easy nor too hard to identify anonymous speakers. Setting the bar "too low will chill potential posters from exercising their First Amendment right to speak anonymously. The possibility of losing anonymity in a future lawsuit could intimidate anonymous posters into self-censoring their comments or simply not commenting at all." *Cahill*, 884 A.2d at 457.

Courts have drawn on the media's privilege against revealing sources in civil cases to enunciate a similar rule protecting against the identification of anonymous Internet speakers. The leading decision on this subject, *Dendrite v. Doe*, established a five-part standard that became a model followed or adapted throughout the country:

> **1. Give Notice:** Courts require the plaintiff (and sometimes the Internet Service Provider) to provide reasonable notice to the potential defendants and an opportunity for them to defend their anonymity before issuance of any subpoena.
>
> **2. Require Specificity:** Courts require the plaintiff to allege with specificity the

speech or conduct that has allegedly violated its rights.

3. Ensure Facial Validity: Courts review each claim in the complaint to ensure that it states a cause of action upon which relief may be granted based on each statement and against each defendant.

4. Require An Evidentiary Showing: Courts require the plaintiff to produce evidence supporting each element of its claims.

5. Balance the Equities: Weigh the potential harm (if any) to the plaintiff from being unable to proceed against the harm to the defendant from losing the First Amendment right to anonymity.

Id. at 760-61.

Although some jurisdictions employ the fifth prong, and some do not, the record in this case does not require the Court to decide whether to adopt it. But the first four parts of the test represent the minimum protections required by the First Amendment. Virginia should require no less, and, explained below, the trial court's decision should therefore be reversed based on the first four parts of the test alone.

The leading authority for rejection of the fifth, explicit balancing stage of the analysis is the Delaware Supreme Court in *Doe v. Cahill*, 884 A.2d 451. In *Cahill*, the trial court had ruled that a town councilman who sued over statements attacking his fitness to hold office could identify the anonymous posters so long as he was not proceeding in bad faith and could establish that the statements about him were actionable because they might have a defamatory meaning. However, the Delaware Supreme Court ruled that a plaintiff must put forward evidence sufficient to establish a prima facie case on all elements of a defamation claim that ought to be within his control without discovery, including evidence that the statements are false.

We argue in the final section of this brief for the adoption of the original *Dendrite* standard

rather than the *Cahill* variation, but for the present purposes it is sufficient to note the many other appellate courts that have adopted either *Dendrite* or *Cahill*.

The following state appellate courts have endorsed the *Dendrite* test, including the final balancing stage:

> *Mobilisa v. Doe*, 170 P.3d 712 (Ariz. App. 2007): A private company sought to identify the sender of an anonymous email message who had allegedly hacked into the company's computers to obtain information that was conveyed in the message. Directly following *Dendrite*, and disagreeing with the Delaware Supreme Court's rejection of the balancing stage, the court analogized an order requiring identification of an anonymous speaker to a preliminary injunction against speech. The Court called for the plaintiff to present evidence sufficient to defeat a motion for summary judgment, followed by a balancing of the equities between the two sides.
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> *Independent Newspapers v. Brodie*, 966 A.2d 432 (Md. 2009): The court required notice to the Doe, articulation of the precise defamatory words in their full context, a prima facie showing, and then, "if all else is satisfied, balanc[ing of] the anonymous poster's First Amendment right of free speech against the strength of the prima facie case of defamation presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity." *Id.* at 457.
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> *Mortgage Specialists v. Implode-Explode Heavy Industries*, 999 A.2d 184 (N.H. 2010): A mortgage lender sought to identify the author of comments saying that its president "was caught for fraud back in 2002 for signing borrowers names and bought his way out." The New Hampshire Supreme Court held that "the Dendrite test is the appropriate standard by which to strike the balance between a defamation plaintiff's right to protect its reputation and a defendant's right to exercise free speech anonymously." *Id.* at 193.
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> *Pilchesky v. Gatelli*, 12 A.3d 430 (Pa. Super. 2011): The court required a city council chair to meet the *Dendrite* test before she could identify constituents whose scabrous accusations included selling out her constituents, prostituting herself after having run as a reformer, and getting patronage jobs for her family.
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> *In re Indiana Newspapers*, 963 N.E.2d 534 (Ind. App. 2012): The Court reversed on order allowing the recently retired head of a local charity to identify an anonymous individual who had commented on a newspaper story about the financial problems of the charity by asserting that the missing money could be found in the plaintiff's bank account, because he had provided no evidence that the accusation was false.
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> Several other state appellate courts have followed a *Cahill*-like summary judgment standard

without express balancing:

> *Krinsky v. Doe 6*, 72 Cal. Rptr. 3d 231 (Cal. App. 2008): The appellate court reversed a trial court decision allowing an executive to learn the identity of several online critics who allegedly defamed her by such references as "a management consisting of boobs, losers and crooks."
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> *In re Does 1-10*, 242 S.W.3d 805 (Tex. App. 2007): The court granted mandamus reversing a decision allowing a hospital to identify employees who had disparaged their employer and allegedly violated patient confidentiality through posts on a blog.
>
> *Solers v. Doe*, 977 A.2d 941 (D.C. 2009): The court held that a government contractor could identify an anonymous whistleblower who said that plaintiff was using unlicensed software if it produced evidence that the statement was false. The court adopted *Cahill* and expressly rejected *Dendrite*'s balancing stage.

Intermediate appellate courts in two other states have refused to create special procedures pursuant to the First Amendment because they concluded that existing state procedural rules provided equivalent protections, giving Doe defendants the opportunity to avoid being identified pursuant to subpoena if the plaintiff cannot establish a prima facie case. In Illinois, two appellate panels relied on Illinois court rules that already required a verified complaint, specification of the defamatory words, determination that a valid claim was stated, and notice to the Doe. *Maxon v. Ottawa Pub. Co.*, 929 N.E.2d 666 (Ill. App. 2010); *Stone v. Paddock Pub. Co.*, 961 N.E.2d 380 (Ill. App. 2011). In Michigan, the Court of Appeal said that an anonymous defendant could obtain a protective order against discovery, deferring enforcement of an identifying subpoena while he pursued a motion for summary disposition either on the face of the complaint or for failure to produce sufficient evidence of defamation. *Thomas M. Cooley Law School v. John Doe 1*, — N.W.2d —, 2013 WL 1363885 (Mich. App. Apr. 4, 2013). Because the court deemed these state-law procedures adequate to meet First Amendment standards, and accordingly reversed the trial court's order enforcing the plaintiff's subpoena, it declined to decide whether special First Amendment procedures might be needed in some cases. The court recognized that a later case might

impel it to adopt the *Dendrite* approach, or that rulemaking by the state supreme court might provide a good basis for the adoption of that standard. Opinion Part V(D).

Federal courts have repeatedly followed *Cahill* or *Dendrite*. *E.g.*, *Highfields Capital Mgmt. v Doe*, 385 F. Supp.2d 969, 976 (N.D. Cal. 2005) (required an evidentiary showing followed by express balancing of "the magnitude of the harms that would be caused to the competing interests"); *Art of Living Foundation v. Does 1-10*, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011) (endorsing the *Highfields Capital* test); *Fodor v. Doe*, 2011 WL 1629572 (D. Nev. Apr. 27, 2011) (following *Highfields Capital*); *Koch Industries v. Doe*, 2011 WL 1775765 (D. Utah May 9, 2011) ("The case law . . . has begun to coalesce around the basic framework of the test articulated in *Dendrite*," *quoting SaleHoo Group v. Doe*, 722 F. Supp.2d 1210, 1214 (W.D. Wash. 2010)); *Best Western Int'l v Doe*, 2006 WL 2091695 (D. Ariz. July 25, 2006) (court used a five-factor test drawn from *Cahill*, *Dendrite* and other decisions); *In re Baxter*, 2001 WL 34806203 (W.D. La. Dec. 20, 2001) (preferred *Dendrite* approach, requiring a showing of reasonable possibility or probability of success); *Sinclair v. TubeSockTedD*, 596 F Supp2d 128, 132 (D.D.C. 2009) (court did not choose between *Cahill* and *Dendrite* because plaintiff would lose under either standard); *Alvis Coatings v. Does*, 2004 WL 2904405 (W.D.N.C. Dec. 2, 2004) (court ordered identification after considering a detailed affidavit about how certain comments were false); *Doe I and II v. Individuals whose true names are unknown*, 561 F. Supp.2d 249 (D. Conn. 2008) (identification ordered only after the plaintiffs provided detailed affidavits showing the basis for their claims of defamation and intentional infliction of emotional distress).

Plaintiffs who seek to identify Doe defendants often suggest that requiring the presentation of evidence to obtain enforcement of a subpoena to identify Doe defendants is too onerous a burden, because plaintiffs who can likely succeed on the merits of their claims will be unable to present such

proof at the outset of their cases. Quite to the contrary, however, many plaintiffs succeed in identifying Doe defendants in jurisdictions that follow *Dendrite* and *Cahill*. *E.g.*, *Fodor v. Doe*, *supra*; *In re Baxter*, *supra*; *Does v. Individuals whose true names are unknown*, *supra*; *Alvis Coatings v. Does*, *supra*. Indeed, in *Immunomedics v Doe*, 775 A.2d 773 (N.J. App. 2001), a companion case to *Dendrite*, the court ordered that the anonymous speaker be identified. In *Dendrite* itself, two of the Does were identified while two were protected against discovery. Moreover, this argument fails to acknowledge the fact that an order identifying the anonymous defendant is a form of relief, relief that can injure the defendant (by exposing the defendant to retaliation at the hands of the plaintiff and/or its supporters), and relief that can benefit the plaintiff by chilling future criticism as well as by identifying critics so that their dissent can be more easily addressed. Courts do not and should not give relief without proof.

In the court below, Hadeed relied on *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26, 37 (Cir. Ct. Fairfax Cy. Jan. 31, 2000), *reversed on other grds sub nom America Online v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001). Not only was this case decided well before *Dendrite* and its progeny adopted more exacting standards, but the decision spoke of courts being "satisfied by the pleadings or evidence." Although AOL appealed to the Virginia Supreme Court, its appeal raised only the issue whether the plaintiff was entitled to sue anonymously, not whether the order compelling identification of the AOL user was constitutionally correct. The following year, another case about a subpoena to identify a Doe defendant reached the Virginia Supreme Court, but the constitutional issue was not presented directly—as in *Anonymous Publicly Traded Co.*, which arose from litigation in Indiana, the issue arose from a commission from a California court to pursue discovery in support of a tort claim pending in that state, and the only issue was whether, as a matter of comity, to respect the California court's ruling that, on the facts

of that case, the First Amendment did not protect the Doe against being identified. *AOL v. Nam Tai Corp.*, 264 Va. 583 (2002). Thus, the issue remains open in the Virginia courts.

Hadeed argued below that there is nothing to balance on the anonymous defendant's side of the scale because defamation is outside the First Amendment's protection and the speech at issue in this case is defamatory; the lower court accepted a variant of this point when it decided that, because the speech at issue is per se defamatory, it enjoys no First Amendment protection. But this argument begs the question, and courts in other states, facing precisely the same argument, have understood that the argument is fundamentally unsound. Indeed, the United States Supreme Court held just this past Term that even in the defamation context, false speech can be protected by the First Amendment unless the speech is shown to have been knowingly or recklessly false. *United States v. Alvarez*, 132 S.Ct. 2537 (2012). At this point, Hadeed has made only vague, unsworn allegations, and the issue in the case is what showing a plaintiff should have to make before an anonymous critic is stripped of that anonymity by an exercise of government power. As we show in the next part of the brief, although Hadeed has claimed that some false statements have been made, it submitted no evidence in support of those claims, nor shown that the statements on which the suit is based are a proper basis for a defamation action. Indeed, Hadeed's presentation below was so sketchy that it is doubtful that it can even meet the legitimate, good faith belief standard for which it argued.

C. Hadeed Did Not Make the Showing Required Before Identification of John Doe Speakers May Be Ordered.

The circuit court erred in several respects in analyzing the showing that Hadeed had to make in support of its subpoena to identify Doe 1. Notice was provided (by Yelp) and Hadeed set forth the entire allegedly tortious statements verbatim, but Hadeed neither alleged a valid claim against

any of the Doe defendants, nor presented evidence supporting those claims.

1. Although Hadeed Initially Failed to Follow the Constitutionally Required Notice Procedures, This Failure Was Corrected by Following the Procedures Set Forth in the Virginia Code.

The first requirement in the *Dendrite / Cahill* consensus approach is for the plaintiff to notify the Doe of its efforts to take away his anonymity. Indeed, notice and an opportunity to defend is a fundamental requirement of constitutional due process. *Jones v. Flowers*, 547 U.S. 220 (2006). Thus, courts have held that when they receive a request for permission to subpoena an anonymous Internet poster, the plaintiff must undertake efforts to notify the posters that they are the subject of a subpoena, and then withhold any action for a reasonable period of time until the defendant has had time to retain counsel. *Seescandy.com*, 185 F.R.D. at 579; *Dendrite*, 775 A.2d at 760.

In Virginia, this aspect of the *Dendrite* test is largely addressed by the procedural rule adopted by the Virginia legislature in the wake of *In re Subpoena Duces Tecum to America Online*, 52 Va. Cir. 26, 37 (Cir. Ct. Fairfax Cy. Jan. 31, 2000), *reversed on other grds. sub nom. America Online v. Anonymous Publicly Traded Co.*, 542 S.E.2d 377 (Va. 2001). Specifically, Virginia Code section 8.01-407-1 requires the plaintiff to furnish with its subpoena a complete set of the materials on which it relies to show a basis for identification of the anonymous speaker, at least thirty days before the return date on the subpoena, Virginia Code section 8.01-407-1(A)(1); the ISP receiving the subpoena and accompanying materials must provide it to the Doe within five days of receiving these materials. Virginia Code section 8.01-407-1(A)(2). For those Does who have been required to provide contact information to the ISP as a condition of receiving services, this procedure is sufficient to meet the First Amendment's notice requirement.[4]

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[4]In cases where the ISP has not required registration, and hence may not have contact information for the Doe defendants, the plaintiff can often meet the notice requirement by providing

2. Hadeed Did Not Plead Verbatim the Allegedly Defamatory Words in Their Proper Context, but It Has Attached the Entire Statements to Its Complaint.

The qualified privilege to speak anonymously requires a court to review the plaintiff's claims to ensure that he does, in fact, have a valid reason for piercing each speaker's anonymity. Thus, the court should require the plaintiff to set forth the exact statements by each anonymous speaker that are alleged to have violated his rights. In *Fuste v. Riverside Healthcare Association*, 265 Va. 127, 134 (2003), the Supreme Court reiterated its holding in *Federal Land Bank of Baltimore v. Birchfield*, 173 Va. 200, 215 (1939), that "the exact words [of an alleged libel] must be set out in the declaration in haec verba." "The law requires the very words of the libel to be set out in the declaration in order that the court or judge may judge whether they constitute a ground of action." (emphasis deleted). Virginia is but one of many states, and many federal courts, that require that defamatory words be set forth verbatim in a complaint for defamation. *Royal Palace Homes v. Channel 7 of Detroit*, 495 N.W.2d 392, 396 (Mich. App. 1992); *Asay v. Hallmark Cards*, 594 F.2d 692, 699 (8th Cir. 1979).

The complaint characterizes the allegedly defamatory words, rather than setting them forth in haec verba, but the entire reviews were attached to the complaint (and appear in the Appendix at pages 23 to 25). Moreover, the complaint specifies the ways in which the words are allegedly false—Hadeed alleges that the authors were not customers, and hence that the services described were not provided. That could be sufficient to meet the second prong of the *Dendrite* test, although

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notice by a communication posted on the same forum where the Doe's challenged expression occurred. As the owner of a Yelp business account, for example, Hadeed has the ability to post a response to any posting directly under the posting, an opportunity that it has taken in several instances. App. 84, 85, 101. Second, Yelp account holders can send each other private messages. App. 79b ¶ 13.

as discussed below it creates serious problems for Hadeed at the third part of the test—alleging a proper cause of action.

3. Hadeed's Claim for Defamation Is Seriously Flawed.

Hadeed complaint does not quite allege a valid claim of defamation against the authors of the seven anonymous reviews. To be sure, it alleges that the Does have made false statements, but the only specific allegation of falsity is the assertion that the Does were not, in fact, customers of Hadeed even though the reviews stated that they were customers. Hadeed also alleges that the services claimed in the reviews were never performed. Notably, however, Hadeed never alleges that the substantive problems set forth in the reviews, such as charging twice the advertised price, are themselves false.

Under Virginia law, the elements of libel are "(1) publication of (2) an actionable statement with (3) the requisite intent. . . . To be actionable, the statement must be both false and defamatory." *Jordan v. Kollman*, 269 Va. 569, 575 (Va. 2005). However, "[s]light inaccuracies of expression are immaterial provided the defamatory charge is true in substance, and it is sufficient to show that the imputation is 'substantially' true." *Id.* at 576, *quoting Saleeby v. Free Press*, 197 Va. 761, 763 (Va. 1956). As the Fourth Circuit has explained, "if the gist or 'sting' of a statement is substantially true, minor inaccuracies will not give rise to a defamation claim." *AIDS Counseling & Testing Ctrs v. Grp. W Television*, 903 F.2d 1000, 1004 (4th Cir. 1990). In other words, "the falsity of a statement and the defamatory 'sting' of the publication must coincide." *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir.1993).

Falsely stating oneself to be a former customer of Hadeed does not defame Hadeed. To be sure, falsely claiming that Hadeed committed certain wrongs could be defamatory, but Hadeed's failure to allege that accusations of overcharging are false undercuts the force of its defamation

claims. Indeed, Hadeed's own statements on the Yelp web site implicitly conceded that accusations of overcharging, by comparison to Hadeed's attractive low-price advertising, may well be true. The great majority of the negative reviews of Hadeed's services address the disparity between Hadeed's advertised prices and the prices that are actually charged once customers have surrendered their rugs to Hadeed's staff. *See generally* App. 83-118. Hadeed has posted responses to several of these posts that either ignore the accusations about overcharging and misleading advertising, or acknowledge the charge but apologize and promise to improve in future dealings. App. 84, 85, 101. Because Hadeed did not sue the authors of the many posts saying the same thing as the seven Doe reviewers said, it was likely satisfied that **those** reviews came from actual customers reporting their own experiences. Consequently, even if the seven defendants were not actual Hadeed customers, the descriptions of defects in advertising and price charges would be substantially true, and hence not the proper subject of a libel claim.

Hadeed's claims are similarly deficient under the related doctrine that a libel-proof plaintiff cannot sue for defamation. *E.g.*, *Bustos v. A & E Television Networks*, 646 F.3d 762, 765-767 (10th Cir. 2011); *Cerasani v. Sony Corp.*, 991 F. Supp. 343, 354-355 (S.D.N.Y. 1998). Although we have found no reported Virginia decision addressing the libel-proof plaintiff doctrine, it follows from the fundamental precept that a victim of defamation can obtain damages only for incremental harm done to his reputation by the defamation; if its reputation has already been destroyed in the forum where the Doe defendants have expressed their own views, it has no remedy. *Austin v. American Ass'n of Neurological Surgeons*, 253 F.3d 967, 974 (7th Cir. 2001); *Moldea v. New York Times Co.*, 22 F.3d 310, 318-319 (D.C. Cir. 1994). The very fact that so many other reviews on Yelp, whose veracity Hadeed does not contest, accuse Hadeed of the same kind of advertising and overcharge abuses that the authors of the challenged reviews have made, shows that even if the anonymous reviewers did

not **personally** have the negative experiences that they describe, it would be implausible for Hadeed to allege that the presence of a few more reviews saying the same thing as dozens of actual customers had already said would cause Hadeed any incremental harm. Therefore, the complaint may not allege a valid claim for defamation.

D. Hadeed Presented No Evidence That the Doe Defendants Made Any False Statements.

Even if the Court concludes that defamation has at least been adequately alleged about one portion of each of the challenged statements, no person should be subjected to compulsory identification through a court's subpoena power unless the plaintiff produces sufficient evidence supporting each element of its cause of action to show that it has a realistic chance of winning a lawsuit against that defendant. This requirement, which has been followed by every federal court and every state appellate court that has addressed the standard for identifying anonymous Internet speakers, prevents a plaintiff from being able to identify his critics simply by filing a facially adequate complaint. In this regard, plaintiffs often claim that they need to identify the defendants simply to proceed with their case. However, relief is generally not awarded to a plaintiff unless and until the plaintiff comes forward with evidence in support of his claims, and the Court should recognize that identification of an otherwise anonymous speaker is a major form of relief in cases like this. Requiring actual evidence to enforce a subpoena is particularly appropriate where the relief itself may undermine, and thus violate, the defendant's First Amendment right to speak anonymously.

To address this potential abuse, the Court should borrow by analogy the holdings of cases involving the disclosure of anonymous sources. Those cases require a party seeking discovery of information protected by the First Amendment to show that there is reason to believe that the

information sought will, in fact, help its case. *In re Petroleum Prod. Antitrust Litig.*, 680 F.2d 5, 6-9 (2d Cir. 1982); *Richards of Rockford v. PGE*, 71 F.R.D. 388, 390-391 (N.D. Cal. 1976). *Cf. Schultz v Reader's Digest*, 468 F.Supp. 551, 566-567 (E.D. Mich. 1979). In effect, the plaintiff should be required to meet the summary judgment standard of creating genuine issues of material fact on all issues in the case before it is allowed to obtain their identities. *Cervantes v. Time*, 464 F.2d 986, 993-994 (8th Cir. 1972). "Mere speculation and conjecture about the fruits of such examination will not suffice." *Id.* at 994.

The extent to which a plaintiff who seeks to compel disclosure of the identity of an anonymous critic should be required to offer proof to support each of the elements of his claims at the outset of his case varies with the nature of the element. Particularly in suits for defamation, several elements of the plaintiff's claim will ordinarily be based on evidence to which the plaintiff, and often not the defendant, is likely to have easy access. For example, the plaintiff is likely to have ample means of proving that a statement is false and that it caused the plaintiff harm. *See* App. 163 (Hadeed counsel acknowledges it could prove prima facie case of impact on business). Thus, it is ordinarily proper to require a plaintiff to present proof of such elements of its claim as a condition of enforcing a subpoena for the identification of a Doe defendant.

Here, even if the complaint were facially adequate, Hadeed's subpoena fails because it has adduced no evidence in support of its complaint. There is no evidence that anything said about Hadeed in the seven statements is false, or that the any of the seven statements has caused harm to Hadeed's reputation. Hadeed has not attempted to prove that the anonymous posters have misstated its marketing and sales practices, and has not even tried to prove that the anonymous reviewers are not its customers. Indeed, although Hadeed's complaint alleges that Hadeed undertook an investigation to ascertain whether the seven anonymous reviewers were customers, it did not

specifically allege what steps it undertook, and its complaint suggests that it was an absence of information, rather than affirmative information that it found, that led it to conclude that these specific anonymous reviewers, were not customers. App. 4 ¶ 17 (Complaint stating, "Not only was Hadeed Carpet unable to find any evidence that the negative reviewers were ever Hadeed Carpet customers . . ..").

Moreover, given the absence of any specific allegations about how Hadeed formulated its belief that the seven anonymous reviewers were not customers, the trial court had no basis for deciding whether Hadeed had a legitimate belief that the specific detractors whom it chose to sue were not customers, and there is good reason in the record to doubt that Hadeed's suspicions had even a reasonable basis. Hadeed alleged that it had reviewed its "customer database," JA 3 ¶ 12, but it offered no explanation of what information it had in its database that it could possibly have hoped to match with the reviews. The fact that the complaint cites the specific fact that one of the reviewers reported her location as being "Haddonfield, NJ," and alleges that Hadeed "does no business in that location," JA 4 ¶ 18, suggests that Hadeed may have been trying to determine whether it had records of customers with the names and locations accompanying the reviews. But the record establishes that Yelp allows its users to preserve their anonymity by listing pseudonymous names and locations, App. 78 ¶ 3, and names and locations may change. Consequently, the lack of matches between the names and locations on the reviews and Hadeed's customer database would not be evidence of anything.

Moreover, although the complaint cites the similarities between the substantive complaints in several of the reviews as implying that they might have had common authorship (that is to say, by a single competitor), the fact that those same complaints are echoed in dozens of other reviews whose authorship Hadeed does not attribute to any competitor suggests that the authors may well just

be other disgruntled customers addressing a common problem with Hadeed. So, too, the fact that the challenged reviews were each posted from separate IP addresses suggests that they each had different authors, App. 185 ¶ 5, as does the fact that multiple Yelp customers who received Yelp's notice of the subpoena contacted its counsel and explained that they were, in fact, dissatisfied customers. *Id.* ¶ 4. Finally, the fact that Hadeed declined Yelp's offer to receive, in confidence, the names of any competitors whom Hadeed suspects of using Yelp to drag down the Hadeed business, so that Yelp could conduct its own investigation to enforce its ban on such pseudo-reviews, *id.*¶ 6, tends to undercut Hadeed's claimed good faith in pursuing the subpoena. In short, the record contains no evidence that the reviews are anything other that what they purport to be—expressions of dissatisfaction from Hadeed customers. There was, therefore, no evidentiary basis for enforcing the subpoena.

5. The Case Should Be Remanded for Application of the *Dendrite* Balancing Test.

If, on remand, Hadeed amends its complaint and submits evidence sufficient to establish a prima facie case of defamation against each Doe defendant,

> [t]he final factor to consider in balancing the need for confidentiality versus discovery is the strength of the movant's case . . .. If the case is weak, then little purpose will be served by allowing such discovery, yet great harm will be done by revelation of privileged information. In fact, there is a danger in such a case that it was brought just to obtain the names . . .. On the other hand, if a case is strong and the information sought goes to the heart of it and is not available from other sources, then the balance may swing in favor of discovery if the harm from such discovery is not too severe.
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> *Missouri ex rel. Classic III v. Ely*, 954 S.W.2d 650, 659 (Mo. App. 1997).

Similarly, *Dendrite* called for such individualized balancing when the plaintiff seeks to compel identification of an anonymous Internet speaker:

> [A]ssuming the court concludes that the plaintiff has presented a prima facie cause

> of action, the court must balance the defendant's First Amendment right of anonymous free speech against the strength of the prima facie case presented and the necessity for the disclosure of the anonymous defendant's identity to allow the plaintiff to properly proceed.
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> 775 A.2d at 760.

A standard comparable to the test for grant or denial of a preliminary injunction, where the court considers the likelihood of success and balances the equities, is particularly appropriate because an order of disclosure is an injunction—not even a preliminary injunction. In every case, a refusal to quash a subpoena for the name of an anonymous speaker causes irreparable injury, because once speakers lose anonymity, they can never get it back. Moreover, denial of a motion to identify the defendant based on either lack of sufficient evidence or balancing the equities does not compel dismissal of the complaint. Plaintiffs can renew their motions after submitting more evidence. The inclusion of a balancing stage allows Does to show that identification may expose them to significant danger of extra-judicial retaliation. In that case, the court might require a greater quantum of evidence on the elements of plaintiff's claims so that the equities can be correctly balanced.

On the other side of the balance, a court should consider the strength of the plaintiff's case and his interest in redressing the alleged violations. The Court can consider not only the strength of the plaintiff's evidence but also the nature of the allegations, the likelihood of significant damage to the plaintiff, and the extent to which the plaintiff's own actions are responsible for the problems of which he complains. The balancing stage allows courts to apply a *Dendrite* analysis to many different causes of action, not just defamation, following the lead of the Arizona Court of Appeals, which in *Mobilisa v. Doe* warned against the consequences of limiting the test to only certain causes of action. 170 P.3d at 719. If courts impose such limits, plaintiffs who hope to identify and

intimidate anonymous speakers could simply conjure up additional causes of action to allege against them.

In this case, the record does not enable the Court to assess the equitable considerations in the case. On remand, both plaintiff and the Doe defendants, if they take advantage of notice, may offer evidence and argument permitting the effective application of the balancing stage.

II. THE COURT LACKED JURISDICTION TO SUBPOENA DOCUMENTS FROM YELP.

The trial court decided (App. 181-182) that it had jurisdiction to compel Yelp to bring documents from its San Francisco headquarters to Alexandria in response to Hadeed's subpoena because Virginia Code § 8.01-201 allows a foreign corporation authorized to do business in Virginia to be served through its registered agent, because Code § 13.1-766 allows service on a registered agent of any process "required or permitted by law to be served upon the corporation," and because a subpoena is "process" under *Bellis v. Commonwealth*, 241 Va. 257 (1991). The flaw in this reasoning is that none of these authorities address the issue of jurisdiction. In fact, using a Virginia court to compel a foreign corporation to produce documents simply because it has a registered agent in the state runs counter to a long tradition under which the procedure for obtaining evidence from non-party foreign corporations is to obtain a commission to the courts of the corporation's own jurisdiction. The mere fact that Yelp's web site can be accessed through computers located in Virginia is not a sufficient basis for such jurisdiction.

As the United States Court of Appeals for the Fourth Circuit said in *ALS Scan v. Digital Service Consultants*, 293 F.3d 707, 712-713 (4th Cir. 2002), predicating personal jurisdiction on the mere fact that Yelp enables its users to make statements accessible in Virginia through the Internet offends traditional principles of state sovereignty:

> [T]he Internet is omnipresent—when a person places information on the Internet, he can communicate with persons in virtually every jurisdiction. If we were to conclude as a general principle that a person's act of placing information on the Internet subjects that person to personal jurisdiction in each State in which the information is accessed, then the defense of personal jurisdiction, in the sense that a State has geographically limited judicial power, would no longer exist. The person placing information on the Internet would be subject to personal jurisdiction in every State.
> * * *
> In view of the traditional relationship among the States and their relationship to a national government with its nationwide judicial authority, it would be difficult to accept a structural arrangement in which each State has unlimited judicial power over every citizen in each other State who uses the Internet.

Moreover, unlike personal jurisdiction to impose liability on a party under state long-arm statutes, subject to the "minimum contacts" analysis of the Fourteenth Amendment, jurisdiction to enforce subpoenas directed to non-parties remains limited to individuals and companies subject to the state's sovereign power under *Pennoyer v. Neff,* 95 U.S. 714 (1877). Under that power, subpoenas can be served only on persons who are present in the jurisdiction, for documents that are located in the jurisdiction. So far as counsel have been able to discover, every state that has addressed the question has limited its subpoena jurisdiction in that manner.[5] That is why every state has adopted some version of the Uniform Interstate Depositions and Discovery Act ("UIDDA"). In

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[5] *Colorado Mills v. SunOpta Grains & Foods*, 269 P.3d 731, 733-734 (Colo. 2012); *Quest Diagnostics v. Swaters*, 94 So.3d 635 (Fla. Dist. Ct App. 2012); *Laverty v. CSX Transp.*, 404 Ill. App. 3d 534, 538, 956 N.E.2d 1 (Ill. App. 2010); *Syngenta Crop Protection v. Monsanto Co.*, 908 So. 2d 121 (Miss. 2005); *In re National Contract Poultry Growers' Ass'n*, 771 So. 2d 466 (Ala. 2000); *Craft v. Chopra*, 907 P.2d 1109, 1111 (Okla. Civ. App. 1995); *Phillips Petroleum Co. v. OKC Ltd. P'ship*, 634 So.2d 1186, 1187-1188 (La. 1994); *Armstrong v. Hooker*, 135 Ariz. 358, 359, 661 P.2d 208, 209 (Ariz. App. 1982); *John Deere Co. v. Cone*, 239 S.C. 597, 603, 124 S.E.2d 50, 53 (S.C. 1962). *See also Cates v. LTV Aerospace Corp.*, 480 F.2d 620, 623-624 (5th Cir. 1973) (subpoena cannot command production of documents in federal district court different from the one in which the documents are maintained); *Chessman v. Teets*, 239 F.2d 205, 213 (9th Cir. 1956), *rev'd on other grounds,* 354 U.S. 156 (1957) (same); *Wiseman v. American Motors Sales Corp.*, 103 A.D.2d 230, 479 N.Y.S.2d 528 (N.Y. App. Div. 1984) (trial court subpoena to non-party witness could not be enforced; proper procedure is to secure commission to seek discovery under authority of court in witness's own state).

Virginia, the relevant statute is sections 8.01-412.8 *et seq.* of the Virginia Code. California has made it particularly easy for out-of-state parties to obtain California process in aid of civil suits in their own jurisdictions by providing that a request for an issuance of a subpoena in aid of out-of-state proceedings "does not constitute making an appearance in the courts of this state," 2029.300(a), Cal. Code of Civil Procedure, and hence may be effected by the party's out-of-state attorney. These provisions would rarely be needed if Hadeed's expansive notions of subpoena jurisdiction were sound, expanding Virginia's power to subpoena anybody who communicates through Internet web pages accessible in Virginia and to any company that is engaged in interstate commerce including Virginia.

The fact that Yelp complies with Virginia law by registering an agent for service of process does not subject Yelp to subpoena jurisdiction in Virginia. Several courts have expressly rejected the proposition that having a registered agent for service of process subjects the corporation to subpoena jurisdiction that would not otherwise exist. *Quest Diagnostics v. Swaters*, *supra*; *Ariel v. Jones*, 693 F.2d 1058, 1060-1061 (11th Cir. 1982). For example, in *Syngenta Crop Prot. v. Monsanto Co.*, 908 So. 2d 121, 128 (Miss. 2005), reviewing a statute virtually identical to Virginia Code § 13.1-766, the Court said "[t]there is no doubt that the statutory language stating that a foreign corporation's registered agent is that corporation's agent 'for service of process, notice or demand required or permitted by law to be served on the foreign corporation,' does not authorize a party's service of a subpoena duces tecum upon nonresident nonparties." Similarly, in *Phillips Petroleum Co. v. OKC Ltd. Partnership*, 634 So.2d 1186, 1187-1188 (La. 1994), the court said, "A principal consequence of designating an agent for service of process is to subject the foreign corporation to jurisdiction in a Louisiana court. Finding CKB subject to the personal jurisdiction of Louisiana courts, however, does not necessarily mean that this Texas corporation is bound to respond to a

subpoena, duly received, by having to appear and produce documents in a Louisiana court in a lawsuit in which they are not a party."

It was the tradition of limiting subpoena jurisdiction over foreign corporations, and requiring litigants to use UIDDA, that compelled the plaintiffs in *AOL v. Nam Tai Electronics*, 264 Va. 583 (Va. 2002), and *AOL v. Anonymous Publicly Traded Co.*, 261 Va. 350 (2001), to obtain Virginia process to obtain information from America Online ("AOL"), a Virginia company, instead of compelling AOL to produce identifying information through process from the California and Indiana courts, respectively. Assuming that due process would allow Virginia to extend its long-arm statute to include subpoena jurisdiction over foreign corporations that do business over the Internet, it is the legislature, not the courts, that should decide whether to extend Virginia's jurisdiction in that way, risking the possibility that other states may similarly stop according Virginia corporations the privilege of defending the privacy of their own documents in the Virginia courts.

CONCLUSION

The contempt order should be reversed, and the case should be remanded to permit Hadeed to amend its complaint and to furnish evidence supporting its claimed right to identify the anonymous posters, if it is able to do so, and to permit the Doe defendants to counter such a showing. Because disobedience to the order was justified in that Hadeed did not surmount the First Amendment privilege not to identify the anonymous speakers, the contempt order, fine, and attorney fees should be reversed as well. *HCA Health Services of Virginia v. Levin*, 260 Va. 215, 222 (Va. 2000).

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WORD-COUNT CERTIFICATE

I hereby certify that my word processing program, Word Perfect, counted 12190 words in this brief, excluding the cover, tables of contents and authorities, and certificates.

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CERTIFICATE OF SERVICE

I hereby certify that on this7th day of May, 2013, I caused a copy of the brief to be served by first-class mail, postage prepaid, on counsel for plaintiff as follows:

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